

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

**See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24**

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**



DIVISION ONE
FILED: 12/18/2012
RUTH A. WILLINGHAM,
CLERK
BY: mjt

In re the Matter of:) No. 1 CA-CV 11-0745
)
KIRA MARIE MIERA,) DEPARTMENT D
)
Respondent/Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
KENNETH and JANET SERVAIS,) Civil Appellate Procedure)
)
Intervenors/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FC2011-090040
FC2010-008149

The Honorable Glenn M. Davis, Judge

AFFIRMED

Kira Marie Miera
Respondent/Appellant Pro Per

Phoenix

Law Office of Shaw & Gould
By Jason A. Gould
Attorneys for Intervenors/Appellees

Phoenix

G O U L D, Judge

¶1 Kira Marie Miera ("Mother") appeals the court's order allowing the maternal grandparents, Kenneth and Janet Servais

("Grandparents") reasonable visitation with her minor child. Finding no abuse of discretion, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Luis Alberto Guzman ("Father") gave birth to a child out of wedlock in 1997. For the first five and a half years of the child's life, the child and Mother lived in New Mexico with Grandparents. The child was born with cerebral palsy, and based on child's special needs, Grandparents learned how to perform CPR, administer medicine, and assist him with movements for his physical development.

¶3 Mother and child moved to Phoenix in 2004, where Mother married her current husband and had three more children. Father and Grandparents remained in New Mexico.

¶4 In January 2011, Grandparents filed a petition for custody or, in the alternative, visitation.¹ Grandparents' decision to file the petition was motivated in part by their concern over Mother and her husband's use of corporal punishment, food restrictions, and home-schooling, which they believed isolated the child. Mother opposed Grandparents' obtaining visitation based primarily on Mother's belief that Grandparents had discussed certain religious topics with the child after she told them not to do so.

¹ In December 2010, Father filed a paternity petition seeking sole custody of the child. The court eventually consolidated Father and Grandparents' cases.

¶5 On September 8, 2011, the court held an evidentiary hearing on Grandparents' petition. Mother, Father, and Grandparents testified at the hearing. Applying the factors enumerated in *McGovern v. McGovern*, 201 Ariz. 172, 33 P.3d 506 (App. 2001) and Arizona Revised Statutes ("A.R.S.") Section 25-409, the court found it was in the child's best interests to have reasonable visitation with Grandparents. Mother timely appealed.

DISCUSSION

¶6 The court was authorized to award Grandparents visitation if it was in the child's best interests. A.R.S. § 25-409(A)(3). We review the court's decision to grant or deny grandparent visitation for abuse of discretion. *McGovern*, 201 Ariz. at 175, ¶ 6, 33 P.3d at 506. When visitation with a child is involved, the trial court is in the most favorable position to determine the best interests of the child. *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). As a result, unless the trial court has clearly mistaken or ignored the evidence, a reviewing court will not disturb the court's visitation decision. *Id.*

¶7 Parents possess a due process right to make decisions concerning the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 66-67 (2000). As a result, in making a decision concerning grandparent visitation under A.R.S. § 25-409, courts must apply a rebuttable presumption that "a fit

parent acts in his or her child's best interest in decisions governing the child's care, custody, and control, including decisions concerning grandparent visitation." *McGovern*, 201 Ariz. at 177, ¶ 17, 33 P.3d at 511. Moreover, a fit parent's decision as to whether visitation is in their child's best interests is entitled to "some special weight," and a parent's voluntary agreement to some visitation must be given "significant weight." *Id.* at 177-78, ¶ 18, 33 P.3d at 511-12. Finally, "[a]s long as the trial court extends the aforementioned safeguards and makes necessary findings pursuant to § 25-409 . . . the statute permits the court to grant 'reasonable [grandparent] visitation rights,' which may vary from those agreed to or urged by the parent." *Id.* at 179, ¶ 24, 33 P.3d at 513 (internal citations omitted).

¶8 In assessing a child's best interests, A.R.S. § 25-409(C) provides that a court "shall consider" all relevant factors, including:

1. The historical relationship, if any, between the child and the person seeking visitation.
2. The motivation of the requesting party in seeking visitation.
3. The motivation of the person denying visitation.
4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities.
5. If one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.

¶9 Mother contends the court abused its discretion concerning the constitutional safeguards established in *Troxel* and *McGovern* because Grandparents failed to rebut the presumption in favor of her decisions concerning visitation. Mother also asserts the court improperly afforded the evidence presented by Grandparents "special weight," even though Grandparents did not present any exhibits or witnesses to support their position. Finally, Mother claims the court failed to give "significant weight" to her voluntary decision to allow Grandparents some visitation.

¶10 We conclude the court applied the proper constitutional standards in awarding visitation to Grandparents. In its order, the court stated it applied "some special weight" to Mother's determination of the child's best interests and "significant weight" to Mother's voluntary agreement to allow some visitation.

¶11 In addition, the record shows there was sufficient evidence to rebut the presumption in favor of Mother's decision regarding Grandparents' visitation. In making the findings required by A.R.S. § 25-409(C), the court stated Grandparents shared a close relationship with the child in the past, were a "positive influence and resource" for the child, were willing and able to assist the child with his physical therapy, the child enjoyed visiting his Grandparents, and reasonable visitation would not adversely impact the child. The court noted that

Mother's primary justification for restricting visitation was her belief that the grandparents had discussed religious issues with the child after she told them not to do so. However, the court determined there was no evidence Grandparents had engaged in any inappropriate or improper communications with the child. Furthermore, in order to allay any concerns by Mother, the court ordered Grandparents to "show respect for parents, including their beliefs, at all times" during their visitation.²

¶12 We understand Mother's concerns about the visitation ordered and that such concerns are made by a fit parent acting in good faith. However, the trial court had sufficient evidence before it to authorize grandparent visitation and imposed sufficient controls on that visitation to meet Mother's concerns. Such visitation is a continuing process and Mother has the right to seek judicial relief from such visitation if she concludes Grandparents have acted in violation of their statements about religious doctrine or otherwise are acting adversely to the child's best interests. Hopefully, both Mother and Grandparents will act in the child's best interests and resolve Mother's concerns without the need for more adversarial litigation.

¶13 Next, Mother argues the court abused its discretion by granting Grandparents visitation while the child is staying with

² In fact, Grandfather testified that if asked to, he would "most certainly" refrain from discussing religious doctrine with the child.

Father in New Mexico.³ Mother asserts that pursuant to A.R.S. § 25-409(D), since Grandparents claim a right of access to the child through Mother, Grandparents' visitation can occur only when the child is with Mother, and not when the child is with Father. Mother bases this argument on the following language contained in A.R.S. § 25-409(D): "[T]he court shall order visitation by a grandparent or great-grandparent to occur when the child is residing or spending time with the parent through whom the grandparent or great-grandparent claims a right of access to the child."⁴

¶14 We disagree with Mother's construction of A.R.S. § 25-409(D). The statute does not require that courts allow grandparent visitation *only* when the child is staying with the parent whom the grandparent claims a right of access (in this case, Mother). Rather, A.R.S. § 25-409(D) places this limitation on visitation "[i]f logistically possible and appropriate."

³ Mother and Father were awarded joint legal custody of the minor child, with Father exercising parenting time for several weeks out of the year with the child in New Mexico.

⁴ The full text of A.R.S. § 25-409(D) states: "If logistically possible and appropriate the court shall order visitation by a grandparent or great-grandparent to occur when the child is residing or spending time with the parent through whom the grandparent or great-grandparent claims a right of access to the child. If a parent is unable to have the child reside or spend time with that parent, the court shall order visitation by a grandparent or great-grandparent to occur when that parent would have had that opportunity."

Here, since Mother lives in Arizona and Father and Grandparents live in New Mexico, it is not logistically possible or appropriate to order visitation only when the child stays with Mother.

¶15 Mother also asserts Grandparents' visitation arrangement with Father violates her constitutional rights regarding her child, because Mother is given no say in the frequency, duration, and nature of Grandparents' visitation when the child is staying with Father. However, the record shows that in awarding visitation to Grandparents - both when the child is staying with Mother and when the child is staying with Father - the court applied the proper constitutional standards and best interest factors listed in A.R.S. § 25-409. See *infra* at pgs. 5-6. Moreover, to the extent Father allows Grandparents more visitation than Mother would permit; such decisions are subject to Father's own due process right to make decisions about Grandparents' visitation.

Attorney's Fees

¶16 Mother argues the court abused its discretion in denying her request for attorney's fees pursuant to A.R.S. § 25-324(A).⁵ A.R.S. § 25-324(A) provides that a court may award

⁵ In making this argument, Mother focuses on a comment made by the court during the evidentiary hearing. During the hearing, the court stated that "rules aren't as strictly followed" in family court as in civil court. Mother construes

attorney's fees "after considering the financial resources of both parties and the reasonableness of the positions they have taken throughout the proceedings." We review a denial of attorney's fees under § 25-324 for an abuse of discretion. *Graville*, 195 Ariz. at 131, ¶ 56, 985 P.2d at 616.

¶17 After considering the financial resources of both parties and their actions during the course of the litigation, the court made specific findings pursuant to § 25-324(A) and denied Mother attorney's fees. Accordingly, we find no abuse of discretion in the denial of Mother's attorney's fees.

¶18 Grandparents request attorney's fees on appeal pursuant to A.R.S. § 25-324 based on their assertion Mother has taken an unreasonable position as to this appeal. We disagree. There is no evidence that Mother was motivated by bad faith or an improper purpose in filing this appeal, and her arguments were grounded on her good faith interpretation of the facts and law. Grandparents' request for attorney's fees is denied.

this statement as meaning the court intended to disregard the requirements of A.R.S. § 25-324(A). Mother takes the court's comment out of context. When read in context, the court was merely stating that it would not award fees to Mother based solely on Mother's allegations Grandparents had filed untimely motions and pleadings during the course of the litigation.

CONCLUSION

¶19 For the forgoing reasons, we affirm the trial court's judgment, and deny Grandparents' and Mother's requests for attorneys' fees.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

MICHAEL J. BROWN, Presiding Judge

/S/

DONN KESSLER, Judge